88-2037

No.

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

LINDA SEWELL - - - - - - Petitioner

versus

JEFFERSON FISCAL COURT, MITCHELL McCONNELL, CARL BROWN, JIM MALONE, SYLVIA WATSON, and RICHARD FREY - - - - Respondents

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On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Was it reversible error for the Court of Appeals to rule that the Petitioner received an adequate pre-deprivation hearing and procedural due process prior to her last demotion in conformity with the Supreme Court mandate in *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985)?

Was it reversible error for the Court of Appeals to adjudicate that Petitioner was barred from recovery under 42 U.S.C. Section 1983 for deprivation of her property without due process by her failure to demonstrate that any post deprivation remedies provided to her under state law were inadequate?

Was it reversible error for the Court of Appeals to withhold judgment that the Petitioner was denied substantive due process?

Was it reversible error for the Court of Appeals to withhold judgment that Petitioner was subjected to unlawful racial and sexual discrimination by her supervisors in the Jefferson County Department of Corrections?

Was it reversible error for the Court of Appeals to withhold judgment that Petitioner was subjected to unlawful retaliation by her supervisors for filing her Equal Employment Opportunity Commission (EEOC) charges against the Jefferson County Department of Corrections?

Was it reversible error for the Court of Appeals to rule that the Petitioner waived her right under the Seventh Amendment to a trial by jury upon her claims under 42 U.S.C. Section 1981 and 1983?

Did the opinion and judgments of the Court of Appeals unlawfully violate Congressional policy in 28 U.S.C. Section 2072?

Was it reversible error for the Court of Appeals to withhold judgment that the District Court violated Petitioner's right to a jury trial upon her Section 1981 and Section 1983 claims under the Seventh Amendment of the *United States Constitution?*

Did the Court of Appeals commit reversible error by withholding judgment that the trial court committed plain error by changing the pretrial order from a jury trial to a court trial two days after the final pretrial conference?

Did the Court of Appeals commit reversible error by withholding judgment that the District Court's judgment and opinion was clearly erroneous?

Was it reversible error for the Court of Appeals to rule that the defendants had established a legitimate non-pretextual reason for the disparity in treatment between Petitioner's disciplinary demotions and the other disciplinary cases in the Department of Corrections?

LIST OF ALL PARTIES

LINDA SEWELL, PETITIONER;
JEFFERSON CIRCUIT COURT;
MITCHELL McCONNELL;
CARL BROWN;
JIM MALONE;
SYLVIA WATSON;
RICHARD FREY, RESPONDENTS

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

LINDA SEWELL - - - - - *Petitioner*

v.

JEFFERSON FISCAL COURT, MITCHELL MCCONNELL, CARL BROWN, JIM MALONE, SYLVIA WATSON AND RICHARD FREY - - - - *Respondents*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner, Linda Sewell, respectfuly prays that a Writ of Ceriotrari issue to review a judgment and opinion of the United States Court of Appeals for the Sixth Circuit, presenting important issues of constitutional law and areas of conflict of law between the various circuits.

OPINIONS BELOW

1. The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 863 F. 2d 461 (6th Cir. 1988). The opinion is reprinted in the the Appendix hereto at pg. 1a.

2. The February 4, 1987 Judgment and Findings of Fact, Conclusions of Law and Memorandum Opinion of the United States District Court for the Western District of Kentucky is reprinted in the Appendix hereto at pgs. 18a and 19a.

STATEMENT OF JURISDICTIONAL GROUNDS

The grounds on which the jurisdiction of the Court is invoked are as follows:

1. The date and time of entry of the Court of Appeals judgment sought to be reviewed is December 19, 1988.

2. The date of the lower court's order denying a petition for rehearing and suggestion for rehearing en banc is February 6, 1989.

3. The jurisdiction of the Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS

UNITED STATES CONSTITUTION AMENDMENT VII—CIVIL TRIALS

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right by trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

UNITED STATES CONSTITUTION AMENDMENT XIV

Section 1. Due Process of Law

* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *

FEDERAL STATUTES AND RULES OF CIVIL PROCEDURE

42 U.S.C. Section 2000e (see apendix p. 1a).

42 U.S.C. Section 1981. **Equal Rights Under the Law.**

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. Section 1983. **Civil action for deprivation of rights**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, of other proper proceeding for redress. . . .

28 U.S.C. Section 2072. **Rules of civil procedure.**

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

> Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution. . . .

The federal rules of civil procedure which this case involves are:

> RULE 38. JURY TRIAL OF RIGHT
>
> (a) **Right Preserved.** The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.
>
> (b) **Demand.** Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.
>
> (c) **Same: Specifications of Issues.** In the demand a party may specify the issues which the party wishes so tried; otherwise the party shall be deemed to have demanded trial by jury for all the issues to triable. If the party has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.
>
> (d) **Waiver.** The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver. . . .
>
> RULE 39. TRIAL BY JURY OR BY HE COURT
>
> (a) **By Jury.** When trial by jury has been demanded as provided in Rule 38, the action shall be

designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or of all those issues does not exist under the Constitution or statutes of the United States.

(b) **By the Court.** Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

(c) **Advisory Jury and Trial by Consent.** In all actions not triable of right by a jury the court upon motion or of its own initiative may try an issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

STATEMENT OF THE CASE

This is a Petition for Writ of Certiorari to review an adverse judgment by the Court of Appeals for the Sixth Circuit which affirmed a judgment for defendants following a bench trial by the United States District Court sitting at Louisville pursuant to Title 28,

United States Code, Sections 1331 and 1343(a)(3) and (4).

Petitioner is a white female who brought claims of sex and race discrimination, retaliation, wrongful demotion, and constructive discharge under 42 U.S.C. Sections 1981 and 1983, and Title VII of the *Civil Rights Act* of 1964, 42 U.S.C. 2000e.

Petitioner further alleged that her employers committed constitutional torts against her property rights in her sergeant's position by notifying her in a hallway conversation with her intermediate supervisor (Major Montgomery) who advised her of the Department's intention to demote her for reasons associated with the community treatment center incident of February 15, 1982.

However, the appointing authority, defendant Richard Frey, in fact demoted her for the implied potential that a security violation could have occurred, and based his demotion decision upon her prior two year history in the department. Petitioner had no opportunity to respond to the appointing authority's decision to demote which included the circumstances of the previously overruled demotion of September 3, 1981.

The Court of Appeals held that Petitioner was barred from recovery under 42 U.S.C. Section 1983 for deprivation of property without due process by her failure to demonstrate that the remedies provided to her under state law, viz., an appeal of the Merit Board's actions to the Jefferson County Circuit Court or to the Jefferson County Fiscal Court, were inadequate to

rectify any error committed by the merit board. (See *Sewell* v. *Jefferson County Fiscal Court,* 863 F. 2d 461, 468 [6th Cir. 1988]).

The Court of Appeals ruled that Petitioner received a pre-deprivation hearing before her second demotion, as mandated by the Supreme Court in *Cleveland Board of Education* v. *Loudermill,* 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985).

The Court of Appeals held that any denial of substantive due process was de minimis and further held that Petitioner failed to carry her burden of proof that there was unlawful racial and sexual discrimination by her supervisors in the department. (See *Sewell, supra.*)

The Court of Appeals held that Petitioner was not subjected to unlawful retaliation although the appointing authority twice demoted petitioner without a pre-demotion hearing before him in violation of the department's personnel policy of April 15, 1981.

The Court of Appeals ruled that the Petitioner waived her right to a jury trial under the Seventh Amendment although the petitioner timely demanded her jury trial pursuant to CR 38. It is uncontested that petitioner did not enter into a stipulation in writing nor in open court consent to a waiver of her jury trial rights.

The United States Congress declared the congressional policy at 28 U.S.C. Section 2072 *(Enabling Act of June 19, 1934)* that:

> [The Federal Rules of Civil Procedure] . . . shall not abridge, enlarge, or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution. . . .

The Court of Appeals ruled that the trial court's opinion and factual findings were not clearly erroneous and were anchored in the court's credibility assessments of a number of witnesses including the petitioner and her immediate supervisors, Secretary Frey and Major Montgomery, and the Court of Appeals adopted the defendants' version of the facts as being most probably correct.

However, the Court of Appeals' judgment raised the standard of proof by which the petitioner was required to prove sex and race discrimination and retaliation.

The Court of Appeals held that the defendants had established a legitimate non pre-textual reason for the disparity in treatment between petitioner's disciplinary demotions and a single comparative disciplinary action, namely, Sgt. Erroyl Cheatham.

ARGUMENT

PRE-DEPRIVATION HEARING

The Court of Appeals committed reversible error by its ruling that Petitioner received an adequate pre-deprivation hearing before Major Montgomery when, in fact, the real basis for the second demotion was to be determined by Secretary Richard Frey only after the Secretary of Corrections conducted a two year review

of Petitioner's personnel file. (See Joint Appendix pg. 99; Trial Exhibit 2-2)

FAILURE TO EXHAUST STATE ADMINISTRATIVE AND JUDICIAL REMEDIES

The Court of Appeals committed reversible error by holding that Petitioner was barred from recovery under Section 1983 for deprivation of property without due process of law for her failure to demonstrate post deprivation remedies under state law were inadequate.

The United States Supreme Court in *Monroe* v. *Pape,* 365 U.S. 167, 81 S. Ct. 473 5 L. Ed. 2d 492 (1961), held that Congress had adopted the *Civil Rights Act* of 1871 (42 U.S.C. Section 1983) with three principal aims viz. (1) to override invidious state legislation which impaired constitutional rights and privileges of United States citizens; (2) to provide a supplemental remedy for infringement of such rights and privileges of United States citizens; and (3) to provide a federal remedy where the state remedy was adequate in theory but might not be available in practice. (*Supra,* 81 S. Ct. 476-477; 480).

The Court said:

> It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. (*Supra,* 480)

Thus, it is not a prerequisite to filing an action under 42 U.S.C., Section 1983 that state judicial remedies be exhausted.

In *Patsy* v. *Florida Board of Regents,* 457 U.S. 496, 102 S. Ct. 2557, 73 L. Ed. 2d 172 (1982) the Supreme Court has recently rejected the Fifth Circuit Court of Appeals' doctrine of a "flexible or analytical approach" to exhaustion of administrative remedies in Section 1983 cases. (See reversed opinion, *Patsy* v. *Florida International University,* 634 F. 2d 900 (5th Cir. 1981); Reversed [1982], 457 U.S. 496.

This action should be supervised by the United States Supreme Court because the Sixth Circuit Court of Appeals' opinion has departed from the mandate of the Supreme Court in *Patsy* v. *Florida Board of Regents, supra,* 457 U.S. 500-501; 502, 506, 507, 509-511, 516, 517. Accord: *Cleveland Board of Education* v. *Loudermill,* 470 U.S. 532 (1985).

The Court of Appeals grievously misread and misapplied the mandate of the Supreme Court in *Cleveland Board of Education* v. *Loudermill,* 470 U.S. 532 (1985) which held that:

> The pretermination hearing need not definitely resolve the propriety of the disciplinary action but it should be an initial check against mistaken decisions, i.e., some opportunity for the employee to present her side of the case and an explanation of the employer's evidence.

In the instant case, most of the employer's evidence was contained in the 2-year review of petitioner's personnel file which required the department to permit petitioner to speak directly to Secretary Frey. The trial judge stated that the department had subjected the petitioner to *two* hasty demotions. He said:

> The Court is not at all convinced by the defendants' attempted distinction between a disciplinary action and an action involving alleged poor judgment on the part of a supervisor such as plaintiff. It would seem that Secretary Frey thwarted the plaintiff of any right to an administrative hearing by his speedy action in demoting her and, at the same time, stating that an action was appealable to the Merit Board. Even if the Department has violated its own rules, the question presented under 42 U.S.C. Section 1983 is whether or not the defendants violated the constitutional rights of the plaintiff to substantive due process. *Joint Appendix, Findings of Fact, Conclusions of Law, and Memorandum opinion entered* 2-4-87, Record #56, Appendix Pg. 24-29.

The employers unlawfully denied petitioner substantive due process by the arbitrary and capricious personnel action of taking away her sergeants rank on September 3, 1981, with callous disregard for her property interest and her employment interest in retaining her sergeants rank intact.

When petitioner filed her EEOC complaint on September 3, 1981, alleging sex and race discrimination, and retaliation on September 14, 1981, the defendants responded by demoting the petitioner at the next earliest opportunity when a pretext for such action was available to be used against the petitioner. This resulted in the infamous second demotion with a hallway encounter between the petitioner, Major Montgomery, and Virginia Lindsey (then a Classification's Officer, who had no background whatsoever in security details

of the Corrections Department) and which the trial court erroneously elevated to the status of a pre-deprivation hearing as required under *Loudermill, supra.*

The Court of Appeals (and the trial court) committed reversible error by the failure to interpret the first demotion under 42 U.S.C. Section 1983 as clear and convincing evidence of the defendant employer's intention to strike down the petitioner's status as a merit status sergeant in the Jefferson County Department of Corrections. This was an intentional act of invidious discrimination as envisioned by *Daniels* v. *Williams,* 474 U.S. 327, 329-336 (1986); *Wilkerson* v. *Johnson,* 699 F. 2d 325, 328 (6th Cir. 1983); *Parate* v. *Istbor,* Slip Opinion #87-6100, Decision 2-17-89, 18 6th Cir. Review —:—.

WAIVER OF JURY TRIAL

Federal Rule of Civil Procedure 38(b) **(Demand)** provides that "any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand, therefor, in writing at any time after the commencement of the action and not later than 10 days after service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party.

Federal Rule of Civil Procedure 38(d) **(Waiver)** provides that "the failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by the party of trial by jury. A demand for trial by jury made as herein pro-

vided may not be withdrawn without the consent of the parties.

The United States Supreme Court in *Hodges* v. *Easton*, 106 U.S. 408, 412 (1882) said:

> . . . The court could not, consistently with the constitutional right of trial by jury, submit a part of the facts to the jury, and itself determine the remainder, without a waiver by the defendants of a verdict by the jury. In civil cases, other than those in equity and admiralty, and except where it is otherwise provided in bankruptcy proceedings, "the trial of issues of fact"—that is, of all the material issues of fact—"in the circuit courts shall be by jury," unless the parties or their attorneys of record, stipulate in writing for the waiver of a jury. . . . There is no such stipulation in this case, and there is nothing in the record from which such stipulation or waiver may be inferred. It has been often said by this court that the trial by jury is fundamental guaranty of the rights and liberties of the people. Consequently, every reasonable presumption should be indulged against its waiver. For these reasons, the judgment below must be reversed.

The Court in *Scott* v. *Neely*, 140 U.S. 106, 110 (1891), said:

> . . . The Constitution, in its Seventh Amendment, declares that "in suits at common law, where the value of the controversy shall exceed $20, the right of trial by jury shall be preserved." In the federal courts this right cannot be dispensed with, except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim, prop-

> erly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency. Such aid in the federal courts must be sought in separate proceedings, to the end that the right to a trial by jury in the legal action may be preserved intact.

In *Dairy Queen* v. *Wood*, 369 U.S. 469 (1962), the Supreme Court said:

> The federal rules did not, however, purport to change the basic holding of *Scott* v. *Neely*, that the right to trial by jury of legal claims must be preserved. Quite the contrary, Rule 38a expressly reaffirms that constitutional principle, declaring: "the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties in violate."
>
> Accord: *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, 470-473 (1959)

The Sixth Circuit Court of Appeals' opinion of December 19, 1988, is contrary to a long-standing series of undisturbed Supreme Court decisions regarding waiver or denial of the constitutional right to trial by jury upon timely demand.

The United States Supreme Court uniformly has determined that a waiver of a constitutional right in any context must at the very *least* be clear. *Fuentes* v. *Shevin*, 407 U.S. 67, 92 S. Ct. 1893, 32 L. Ed. 2d 556 (1972); *KMC Co.* v. *Irving Trust Co.*, 757 F. 2d 752 (6th Cir. 1985).

Judge Kennedy, in dissent in the instant case, held a better view of the Court's directives and of the cir-

cumstances of the present purported waiver. She said, "That there was a waiver here is anything but clear." See Opinion entered December 19, 1988, Nos. 87-5254, 87-5658, at pg. 16.

The Supreme Court in *Parnell* v. *Southall*, 416 U.S. 363 (1979) and *Curtis* v. *Loether*, 415 U.S. 189 (1974) has unequivocally held that the Seventh Amendment right to a jury trial requires a jury trial upon timely demand. Moreover, it is reversible error to deny a jury trial in civil actions presenting mixed legal and equitable claims where either party demanded a jury trial in timely fashion under Rule 38(b) of the Federal Rules of Civil Procedure. See *Curtis* v. *Loether*, *supra*; *Dairy Queen* v. *Wood*, 369 U.S. 469, 82 S. Ct. 894, 8 L. Ed. 2d 44 (1962); *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959); *Accord: Sibbach* v. *Wilson*, 312 U.S. 1 (1941).

The Supreme Court held in *Aetna Ins.* v. *Kennedy*, 301 U.S. 389, 393 (1937) that because the right of jury trial is fundamental, federal courts must indulge every presumption against waiver.

The instant appeal should be determined by the Supreme Court for the further reason that the instant opinion for the Sixth Circuit is in sharp conflict with the opinions of other Circuits upon the standard for a valid waiver to have occurred under Rules 38(d) and 39(a) of the Federal Rules of Civil Procedure.

In *Palmer* v. *United States*, 652 F. 2d 893, 896 (9th Cir. 1981) the Ninth Circuit Court of Appeals said, ". . . We decline to create an exception to the precise

terms of the Federal Rules of Civil Procedure 38(d) and 39(a), although we recognize that other courts have done so. *Id.* at 896.

CLEARLY ERRONEOUS JUDGMENT

The Court of Appeals committed reversible error by its opinion that petitioner did not prove by a preponderance of the evidence that she suffered unlawful discrimination due to her sex and race.

The Court of Appeals disregarded the petitioner's objective documents of disciplinary actions for security violations and restricted its view of the probative evidence to the one nearly identical demotion case. Even when considered alone, the single instance of a probated demotion for a probationary sergeant should suffice to prove disparate treatment. Petitioner was a regular Corrections sergeant with merit status.

The Court of Appeals opinion overlooked or misapprehended the substantial rebuttal evidence of Petitioner's witness, Debra Hutchinson, to show that the Defendant's stated reasons given for Sewell's second demotion were pretextual and not the real reasons. (See Trial Court Findings of Fact, Conclusion of Law, and Opinion at page 36, Joint Appendix, and see Debra Hutchinson's testimony at pg. 275, Joint Appendix).

The Court of Appeals opinion overlooked or misapprehended the substantial statistical evidence adduced at trial by Petitioner Sewell to show disparate treatment. (See Tr. Exhibit No. 12, "Thirteen page document—disciplinary actions between 1980 and 1982 at Joint Appendix pg. 103).

The Court of Appeals opinion overlooked or misapprehended the pivotal point that Plaintiff-Appellant introduced at trial substantial evidence that male correctional officers (including male supervisors Colonel Richard Geaither [BM], Major Mike Montgomery [WM], and Probationary Sgt. Erroyl Cheatham [BM] had recently committed various security infractions, but they each and all retained their current employment status without summary demotions or other severe sanctions under the departmental policy of April 15, 1981. (See Joint Appendix, *Exhibits*, Trial Exhibit 11-1, Joint Appendix p. 73; Trial Exhibit 12, Joint Appendix pg. 103).

The Court of Appeals erroneously ruled that the trial court's opinion and findings of fact were not clearly erroneous as they were anchored in the court's credibility assessments of a number of witnesses including the petitioner and her immediate supervisors, Secretary Frey and Major Montgomery, which the Court of Appeals adopted as being most probably correct.

In so doing, the Court of Appeals committed the grievous error of allowing the trial judge to insulate his findings from review by denominating them as credibility determinations while ignoring the objective documentary evidence of security breakdowns of high ranking male Corrections officers (including plaintiff's immediate supervisors Major Montgomery, 1-day suspension, failed to lock gun box; Colonel Richard Geaither security violation, 3-day suspension) which

evidence was overlooked or misunderstood by the Court of Appeals.

The Supreme Court in *Anderson v. City of Bessemer*, 470 U.S. 564, 573 105 S. Ct. 1504, 1511, 84 L. Ed. 2d 518 (1985) said:

> The trial judge may . . . (not) . . . insulate his findings from review by denominating them credibility determinations for factors other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable fact finder would not credit it.

In the instant case the Court of Appeals' judgment raised the standard of proof by which the petitioner was required to prove sex and race discrimination and retaliation to a clear and convincing standard. The Court of Appeals' judgment raised the petitioner's burden of proof to a clear and convincing standard first by rejecting the disciplinary action against Sgt. Erroyl Cheatham (a probationary sergeant) as sufficient evidence of disparate treatment by itself to establish sex and race discrimination, and secondly by discounting the remainder of the disciplinary actions against Corrections supervisors and other employees who were disciplined less severely than the petitioner. Finally, the Court of Appeals ignored the unrebutted rebuttal testimony of Debra Hutchinson who testified

that the Secretary of Corrections was opposed to females in supervisory positions.

CONCLUSION

The trial court prejudicially discounted Petitioner's substantial statistical evidence that black and male employees were punished less severely for security and other disciplinary infractions over a two-year period before and during Petitioner's promotion and demotions for the position of correctional sergeant. (See "Thirteen Page Document Disciplinary Actions Between 1980 and 1982", Trial Exhibit No. 12, Joint Appendix Pg. 103; *McDonald Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L. Ed. 2d 668 [1973]; *Jackson v. RKO Bottlers of Toledo, Inc.,* 743 F. 2d 370 (6th Cir. 1984). The Court of Appeals' opinion treated the Petitioner's objective statistical evidence as merely a comparison of a single disciplinary action taken against Sgt. Erroyl Cheatham, a black male. However, the opinion grievously overlooks or misapprehends that among the remaining disciplinary infractions, there were less severe sanctions imposed against two of her male supervisors who had recommended her demotions, viz. Col. Gaither and Major Montgomery, for their security violations which also could have endangered the safety of other officers and inmates. *Jackson v. RKO Bottlers of Toledo, Inc., supra;* 42 U.S.C. 2000e.

In her 1981 demotion and in the 1982 demotion, the Petitioner was denied an internal administrative hear-

ing which was her entitlement under the published January 15, 1981, departmental administrative procedures policy for disciplinary actions. Likewise, the Petitioner twice was denied an interview with Richard Frey, Secretary of Corrections, and the appointing authority prior to each demotion.

The Trial Court said, "The Court is not all convinced by the defendant's attempted distinction between a disciplinary action and an action involving alleged poor judgment on the part of a supervisor such as plaintiff." See Findings of Fact, Conclusions of Law, and Memorandum Opinion, Joint Appendix, pg. 29. *Cleveland Board of Education* v. *Loudermill,* 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985).

The employer, Frey, in the second demotion clearly styled the demotion as a disciplinary action in his correspondence to Petitioner dated February 25, 1982. (See Trial Exhibit 2-2, Joint Appendix, p. 99). However, at trial the appointing authority (Frey) styled his second demotion of Petitioner as an administrative demotion for her lack of effective supervision. (See Testimony of Richard A. Frey, Joint Appendix pg. 213, lines 11-12; pg. 368, lines 1-5; pg. 135, lines 17-25; pg. 136, lines 1-8; pg. 132-133; pg. 149, lines 11-21).

The Trial Court was clearly erroneous in its finding of fact and conclusions of law that the Petitioner did not carry her burden of proving intentional sex and race discrimination, retaliation, and disparate treatment on account of her sex and race under Title VII,

and denial of equal protection and due process under Sections 1981 and 1983.

For these reasons and those outlined in the arguments above, this Court is asked to grant a writ of certiorari, vacate the Court of Appeals for the Sixth Circuit's opinion, and award the Petitioner judgment as requested in her original complaint as amended.

Respectfully submitted,

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APPENDIX

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

Nos. 87-5254, 87-5658

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

LINDA SEWELL, - - - - - *Plaintiff-Appellant,*

v.

JEFFERSON COUNTY FISCAL COURT; MITCHELL MCCONNELL; CARL BROWN; JIM MALONE; SYLVIA WATSON; JEFFERSON COUNTY CORRECTIONS DEPARTMENT; RICHARD FREY; JEANNETTE PRIEBE, -- - - - - - *Defendants-Appellees.*

On Appeal from the United States District Court for the Western District of Kentucky

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Decided and Filed December 19, 1988

Before: ENGEL, Chief Judge;* KENNEDY and KRUPANSKY, Circuit Judges.

KRUPANSKY, Circuit Judge, delivered the opinion of the court, in which ENGEL, Chief Judge, joined. KENNEDY, Circuit Judge,(pp. 15-16) delivered a separate opinion concurring in part and dissenting in part.

KRUPANSKY, Circuit Judge. The plaintiff-appellant in this case, Linda Sewell (plaintiff or Sewell), a white

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*The Honorable Albert J. Engel assumed the duties of Chief Judge effective April 1, 1988.

female, has appealed from the entry of final judgment in favor of the defendants-appellees (defendants)[1] after a bench trial. Sewell had alleged racial and sexual discrimination in violation of Title VII of the Civil Rights Act, 42 U.S.C.A. § 2000e, and 42 U.S.C.A. §§ 1981 and 1983; and that she had been deprived of a property interest in her position as a sergeant of the Corrections Department without due process of law in violation of § 1983.

Sewell was a corrections officer employer by the Jefferson County Fiscal Court. She was appointed acting sergeant by the Jefferson County Corrections Department (Corrections Department) on January 4, 1980. On January 18, 1981, the Corrections Department promoted her to the position of a regular sergeant after completing a six month probationary period of service in that grade. On September 3, 1981, Sewell was demoted by the Corrections Department to the position of a corrections officer, because it had been erroneously concluded that her probationary period had not expired.

Sewell filed a charge of racial and sexual discrimination against the Corrections Department that same day, Sep-

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[1]In her complaint, plaintiff had named as defendants the Jefferson County Fiscal Court, which is an administrative and legislative governmental agency of Jefferson County, Kentucky, and which was at all times relevant to this action the employer of Sewell. Plaintiff also named several elected commissioners of the Fiscal Court (Mitchell McConnell, Carl Brown, Jim Malone and Sylvia Watson); the Jefferson County Corrections Department, which is a governmental agency under the control and direction of the Jefferson County Fiscal Court; the Chief Administrative Officer and Secretary of Corrections of the Fiscal Court (Richard Frey) (Secretary Frey); and the Director of Jefferson County Personnel (Jeannette Priebe). The Jefferson County Corrections Department and the Director of Jefferson County Personnel were dismissed from this litigation; plaintiff has not appealed that action. All other parties will be referred to collectively as the "defendants."

tember 3, 1981, with the Equal Employment Opportunity Commission (EEOC). Sewell filed a second charge against the Corrections Department with the EEOC on September 14, 1981, alleging unlawful retaliation and demotion. The Secretary of the Fiscal Court, Richard Frey (Secretary or Frey), wrote Sewell on September 25, 1981, advising her that she had mistakenly been demoted on the erroneous assumption that she was still serving as a probationary employee. Frey retroactively reinstated Sewell on that date with full back pay.

Plaintiff was subjected to a second demotion by the Corrections Department on February 24, 1982 because she had permitted two inexperienced, untrained and unarmed female correction officers to supervise a newly opened wing of the correctional department for a period of nearly 45 minutes, although she was aware that the area in question had experienced inmate disorders several days previously. On the night in question, several inmates again had become unruly, and although no one was injured, the inmates refused to return to order until an armed officer arrived on the scene.

On February 22, 1982, Sewell's supervisor, Major Montgomery, a white male, recommended that she be demoted from sergeant to corrections officer as a result of the incident. Major Montgomery conferred with Sewell for some 30 minutes on that date, in the presence of another employee of the Department of Corrections, and advised her of both of the pending decision to demote her and of the reasons underlying that decision.[2] Secretary Frey thereupon informed the plaintiff on February 24, 1982 that she

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[2]Sewell testified that she was told only that she was to be demoted, and that she was not advised of the evidence which supported this action. Major Montgomery testified that she was informed of the reasons behind her demotion. The district court credited Major Montgomery's version of these events.

was demoted, and advised her that she had the right to appeal the action to the Corrections Merit Board (Merit Board).

Sewell filed an appeal to the Merit Board, which unanimously rejected her challenge. Plaintiff did not further appeal the Merit Board's decision to either the Jefferson Circuit Court or the Jefferson County Fiscal Court, as provided by Kentucky statute, but rather filed the present suit in the United States District Court for the Western District of Kentucky on March 22, 1983. In her complaint, Sewell specifically requested a jury trial for all legal claims presented.

It is undisputed that the plaintiff had properly indorsed a request for a jury trial on the complaint in accordance with Federal Rule of Civil Procedure 38 (b).[3] Following a pretrial conference on July 5, 1986, the court entered an order scheduling the case for a September 23, 1986 jury trial on all issues except plaintiff's claim under Title VII. During the final pretrial conference, conducted on September 15, 1986, counsel for Sewell orally requested a continuance of the September 23, 1986 jury trial date. The district court granted the motion and removed the case from the jury trial docket and continued the case on September 17, 1986 *for trial before the court* on January 22, 1987. ("IT IS ORDERED that this case be remanded from the trial calendar of September 23, 1986, and is continued to *JANUARY 22, 1987, at 10:00 A. M.* for a trial before the

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[3]That rule states that:

> Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. *Such demand may be indorsed upon a pleading of the party.*

Fed. R. Civ. P. 38(b) (emphasis added).

COURT.") (emphasis in original). Plaintiff's counsel made no objection to the court's order reassigning the case for trial before the court until the commencement of the January 22, 1987 trial.

On January 22, 1987, after the parties had announced that they were prepared to proceed with the trial, plaintiff's counsel requested the court to summon the jury. The court examined the order of September 17, 1986, and noted that it stated trial was to be before the court. After a discussion with counsel for the parties, the court concluded that Sewell had waived the right to trial by jury by failing to timely object to the court's September 17, 1986 order removing the case from the jury trial docket. The court proceeded to try all of Sewell's claims under Title VII, and §§ 1981 and 1983. The court entered judgment for the defendants on all counts on February 4, 1987 and filed a memorandum opinion and order on May 22, 1987.

On appeal, Sewell has argued that the district court erred by denying her fundamental constitutional right to a trial by a jury. *See* U.S. Const. amend. VII ("In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . ."); Fed. R. Civ. P. 38(a) ("The right of trial by jury as declared by the Seventh Amendment to the Constitution . . . shall be preserved to the parties inviolate."); *see also Aetna Ins. Co.* v. *Kennedy*, 301 U.S. 389, 393, 57 S. Ct. 809, 811, 81 L. Ed. 2d 1177 (1937); *Bellmore* v. *Mobil Oil Corp.*, 783 F.2d 300, 306 (2nd Cir. 1986). Although the right to a jury trial is guaranteed by the Constitution, "like other constitutional rights, can be waived by the parties." 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2321, at 101 (1971); *see also* Fed. R. Civ. P. 38 (d); 39 (a); *United States* v. *Moore*, 340 U.S. 616, 621, 71 S.Ct. 524, 526, 95 L. Ed. 2d 582 (1951); *Bellmore*, 783 F. 2d at 306. The standard for determining whether there has been a sub-

sequent waiver of a jury trial, which had previously been timely entered pursuant to Federal Rule of Civil Procedure 38 (a), is set forth in Federal Rule of Civil Procedure 39 (a):[4]

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[4]The dissent suggests that the appropriate standard to be applied in construing the validity of a waiver relinquishing a constitutional right, in this case the guarantee of a jury trial under circumstances where a jury demand had been initially duly filed with the court, is that the waiver be "knowing and voluntary" so as "to preserve a fair trial," as announced in *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 237, 93 S. Ct. 2041, 2053, 36 L. Ed. 2d 584 (1973). The dissent further suggests that in *K.M.C. Co.* v. *Irving Trust Co.*, 757 F. 2d 752 (6th Cir. 1985) this circuit adopted the "knowing and voluntary" test to determine the appropriateness of a jury waiver. The dissent misconstrues the pronouncements of *Irving Trust Co.*

The issue joined in *Irving Trust Co.* addressed the proper standard to be applied in determining the validity of a contractual provision incorporated into an agreement between K.M.C. Company and Irving Trust Company whereby the parties purported to mutually waive their respective rights to a jury in any and all future judicial actions arising out of the contract between them. *Irving Trust Co.*, 757 F. 2d at 755-56. Although the panel that decided that controversy concluded that the "knowing and voluntary" standard should be applied to the contractual waiver provision presented in *Irving Trust Co.*, the court was careful to distinguish that "it is clear that the test of waiver that is applied to other constitutional rights . . . is not applicable to trial by jury," regarding "a party's procedural default once litigation has commenced in a particular case." *Irving Trust Co.*, 757 F. 2d at 756 n.4. (quoting with approval 9 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2321, at 101 & n. 52 (1971)); *id.* ("We are convinced, however, that there is a sound rationale underlying the application of different standards in the two instances.").

As the panel itself observed in *Irving Trust Co.*, the Federal Rules of Civil Procedure impose a less stringent standard than that of "knowing and voluntary" in controversies addressing jury waiver generally, noting that the Rules provide for "waiver by

(Footnote Continued on Next Page)

> The trial of all issues so demanded shall be by jury, unless . . . the parties or their attorneys of record, by written stipulation or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury. . . .

Fed. R. Civ. P. 39 (a); *see also* 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2332, at 108-09 (1971); *compare* Fed. R. Civ. P. 38 (d) ("A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties."); 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2321, at 101-02 (1971).

The requirements of Rule 39 (a) have "been interpreted broadly so as to encompass orders entered by the court and not objected to." *Lovelace* v. *Dall*, 820 F. 2d 223, 227 (7th Cir. 1987). In the instant case, the counsel for the plaintiff made an oral motion for a continuance of the trial date during the final pretrial conference on September 15, 1986. The court granted the motion orally, and then entered a written order on September 17, 1986 which stated that the case was continued until January 22, 1987 "*for a trial before the court.*" The court's order of September 17, 1986 was binding upon all parties, *see* Fed. R. Civ. P. 16(e); *Ghandi* v. *Police Dep't of Detroit*, 823 F. 2d 959, 962 (6th Cir. 1987), *cert. denied sub nom. Ghandi* v. *Fayed*, — U.S. —, 108 S. Ct. 774, 981 L. Ed. 2d 861 (1988); *Daniels* v. *Board of Educ. of Ravenna School Dist.*, 805 F. 2d. 203, 209 (6th Cir. 1986);

(Footnote Continued From Preceding Page)

mere inadvertence under Fed. R. Civ. P. 36(d), which provides that failure to file a timely demand constitutes waiver of trial by jury." *Irving Trust Co.*, 757 F. 2d at 756 n.4. Similarly, Rule 39(a) of the Federal Rules of Civil Procedure, which states that the parties to a civil action can waive the right to a jury trial by means of a written stipulation, "is a reasonable requirement calculated to insure the orderly presentation of the business of the court." *Irving Trust Co.*, 757 F. 2d at 757 n.4.

accord Annot., *Binding Effect of Court's Order Entered After Pretrial Conference*, 22 A. L. R. 2d 599, 601-03 (1952), and constituted a "sufficient entry in the record to satisfy the requirements of Fed. R. Civ. P. 39 (a)." *Fields Eng'g & Equip., Inc.* v. *Cargill, Inc.*, 651 F. 2d 589, 592 (6th Cir. 1981) (waiver contained in the court's order); *see also Harden* v. *Adams*, 760 F. 2d 1158, 1166 (11th Cir.) (waiver contained in amended complaint and later orders of the court), *cert. denied sub nom. Grimmer* v. *Harden*, 474 U.S. 1007, 106 S. Ct. 530, 88 L. Ed. 2d 462 (1985); *Moser* v. *Texas Trailer Corp.*, 623 F. 2d 1006, 1011 (5th Cir. 1980) (amended complaint which provided for trial "without a jury" sufficient to waive jury trial); *General Business Serv., Inc.* v. *Fletcher*, 435 F. 2d 863, 864 (4th Cir. 1970) (order of court noting waiver of jury trial); *accord Lovelace*, 820 F. 2d at 227 (pretrial minutes stating that jury demand withdrawn and matter set for bench trial; court decided there was no waiver based upon other grounds).

The plaintiff, however, has urged this court to find that the September 17, 1986 order was insufficient by itself to evidence a waiver of Sewell's right to a jury trial, charging that there was no record that the parties to this controversy had ever discussed the issue. It is well established, however, that there is no requirement that a written expression of waiver be accompanied by any additional documentation. *See, e.g., Fields Eng'g & Equip., Inc.*, 651 F. 2d at 592 ("It is immaterial that the pretrial conference itself was not on the record. The agreement to waive a jury . . . was recorded in the pretrial order."); *Fletcher*, 435 F. 2d at 864 (affirmed trial before court where appellant claimed that he thought court had agreed at pretrial conference to submit issue of damages to jury, but pretrial order reflected waiver of jury trial and the pretrial conference had not been recorded); Annot., *Binding Effect of Court's Order Entered After Pretrial Conference*, 22 A. L. R. 2d 599, 602

(1952) ("[P]arties may be bound by recitals in the pretrial order or report on the theory that they are stipulations."); *accord Moser* v. *Texas Trailer Corp.*, 623 F. 2d 1006, 1010-11 (5th Cir. 1980) (appellant failed to object to amended complaint waiving jury trial; no record that parties had discussed issue).

Furthermore, the fact that the plaintiff in the case at bar made no objection to the language of the September 17, 1986 order for nearly four months provided additional support for the district court's conclusion that there had been a waiver of the jury trial. *See United States* v. *Missouri River Breaks Hunt Club*, 641 F. 2d 689, 693 (9th Cir. 1981) (judge's oral statement that parties had waived jury trial affirmed in light of appellant's failure to have objected in the two months before bench trial began); *Southland Reship, Inc.* v. *Flegel*, 534 F. 2d 639, 644 (5th Cir. 1976) (failure to have made any objection for over a month after judge's oral ruling regarding bench trial sufficient to affirm waiver of jury trial); *accord Harden*, 760 F. 2d at 1168 (no objection made to amendment to the complaint or court's orders indicating waiver of jury trial); *cf. Ghandi*, 823 F. 2d at 963 nn. 1 & 3 (failure to have moved to amend the court's order of September 17, 1986 pursuant to Fed. R. Civ. P. 16 (e)); *Daniels*, 805 F. 2d at 209 (same).

Plaintiff's disclaimer of knowledge that the September 17, 1986 order had assigned the case for a bench trial is likewise of no significance because inadvertence or mistaken impression is not sufficient to relieve the party from the effects of an otherwise vaild waiver of a jury trial. *See Fletcher*, 435 F. 2d at 864; *Bush* v. *Allstate Ins. Co.*, 425 F. 2d 393, 396 (5th Cir.), *cert. denied*, 400 U.S. 833, 91 S. Ct. 64, 27 L. Ed. 2d 64 (1970). Nor did the plaintiff's objection at the commencement of the bench trial serve to reinstate the right to a trial by jury. "Ordinarily, once a party withdraws his demand for a jury trial, with the requisite consent

of the other parties, he may not change his mind." *Hanlon* v. *Providence College*, 615 F. 2d 535, 538-39 (1st Cir. 1980); *see also West* v. *Devitt*, 311 F. 2d 787, 788 (8th Cir. 1963) ("The mere fact that petitioner had changed his mind would not of itself require the court to set aside the procedural order made."); *Fletcher*, 435 F. 2d at 864 (renewed demand for jury trial made five days after pretrial order expressing waiver of same did not preserve right); Annot., *Withdrawal or Disregard of Jury Trial in Civil Action*, 64 A. L. R. 2d 506, 517-19 (1959) ("The rule recognized in a number of cases is that once a waiver of jury trial has matured, the waiver may not be withdrawn at the insistence of one party."); 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2321, at 104 & n. 64 (1971); *accord Bellmore*, 783 F. 2d at 307 ("[S]omething beyond the mere inadvertence of counsel is required to relieve a party from its waiver.") (applying Fed. R. Civ. P. 39 (b)) (quoting *Alvarado* v. *Santana-Lopez*, 101 F. R. D. 367, 368 (S.D.N.Y. 1984)). The suggestion that the district court erred in concluding that Sewell had waived the right to trial by jury is accordingly without merit.

In the alternative, the plaintiff has argued that this action should be reversed and remanded because the district court erred in finding that Sewell did not suffer from sex or race discrimination in her employment. The district court initially determined that Sewell had presented only marginal evidence of disparate treatment based primarily upon a comparison of disciplinary action taken against the plaintiff, a white female, and the actions taken against another officer, Sgt. Erroyl Cheatum (Cheatum), a black male. Nevertheless, the district court accorded the plaintiff's evidence sufficient weight to support a prima facie case that would withstand a defense motion for dismissal. *See Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 252-53, 101 S. Ct. 1089, 1093, 67 L. Ed. 2d 207

(1981); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668 (1973); *Selden Apartment* v. *United States Dep't of Hous. & Urban Dev.*, 785 F. 2d 152, 160 (6th Cir. 1986). The court then concluded that the defendants had articulated a legitimate, nondiscriminatory reason for Sewell's demotion because her actions had endangered the safety of other officers and inmates, while those of Cheatum, the employee with whom her disciplinary actions had been compared, had not. *Burdine*, 450 U.S. at 254, 101 S. Ct. at 1094; *McDonnell Douglas Corp.*, 411 U.S. at 802, 93 S. Ct. at 1824; *Selden Apartments*, 785 F. 2d at 160. Upon concluding that the plaintiff had failed to rebut the nondiscriminatory evidence produced by the defendants, the district court ruled that, as a matter of law, Sewell had failed to carry her burden of proving racial or sexual discrimination under Title VII, *see United States Postal Serv. Bd. of Governors* v. *Aikens*, 460 U.S. 711, 715, 103 S. Ct. 1478, 1481, 75 L. Ed. 2d 403 (1982); *see also Burdine*, 450 U.S. at 256, 101 S. Ct. at 1095; *McDonnell Douglas Corp.*, 411 U.S. at 804, 93 S. Ct. at 1825; *Selden Apartments*, 785 F. 2d at 160-61, or under §§ 1981 and 1983. *See Daniels*, 805 F. 2d at 207 (6th Cir. 1986) ("[T]he order and allocation of proof, applicable in a disparate treatment case under Title VII, may be utilized in adjudicating race discrimination claims arising under sections 1981 and 1983."); *Shah* v. *General Elec. Co.*, 816 F. 2d 264, 267 n.1 (6th Cir. 1987) ("The order and allocation of proof in a section 1981 case are the same as in a Title VII action."); *Long* v. *Ford Motor Co.*, 496 F. 2d 500, 505 n.11 (6th Cir. 1974) ("[T]he principles governing [a Title VII case] apply with equal force to a § 1981 action."); *cf. Cooper* v. *Federal Res. Bank Richmond*, 467 U.S. 867, 874, 104 S. Ct. 2794, 2798, 81 L. Ed. 2d 718 (1984) ("Basic principles of . . . collateral estoppel apply" in discrimination actions predicated upon Title VII, Section 1981 and Section 1983.)

The district court's subsidiary factual findings can be reversed on appellate reveiw only if this court finds them to be "clearly erroneous." *See* Fed R. Civ. P. 52 (a) ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous . . . ."); *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 499, 104 S. Ct. 1949, 1959, 80 L. Ed. 2d 502 (1984) ("A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.") (quoting *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L. Ed. 746 (1984)); *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573, 105 S. Ct. 1504, 1511, 84 L. Ed. 2d 518 (1985) (same standard); *Batts* v. *NLT Corp.*, 844 F. 2d 331, 336 (6th Cir. 1988). In the instant case, the district court's factual findings were anchored in credibility assessments of a number of witnesses, including Sewell herself, her immediate supervisor, Major Montgomery, and Secretary Frey. The court assigned greater credibility to the testimony of Major Montgomery and Secretary Frey than the testimony of Sewell, and adopted their version of the facts. On appellate review, Rule 52 (a) commands that "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."[5] Fed. R.

[5]The Supreme Court has indicated that particular deference is to be given to a trial court's credibility determinations.

> When findings are based on determinations regarding the credibility of witnesses, Rule 52 demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said. *Wainwright* v. *Witt*, 469 U.S. 412, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985).

Anderson, 470 U.S. at 575, 105 S. Ct. at 1512, *accord Batts* 844 F. 2d at 336.

Civ. P. 52 (a); *see also Rose Corp.*, 466 U.S. at 499-500, 104 S. Ct. at 1959; *Connaughton* v. *Harte Hanks Communications, Inc.*, 842 F. 2d 825, 829 (6th Cir. 1988), *cert. granted*, 57 U.S.L.W. 3280 (U.S. Oct. 17, 1988).

Based upon these credibility assessments, the district court's conclusions that the defendants had established a legitimate, nonpretextual reason for the disparity in treatment accorded to Sewell and Sgt. Cheatum and that the plaintiff had failed to present any evidence to refute this justification were not clearly erroneous. *Anderson*, 470 U.S. at 574, 105 S. Ct. at 1512 ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."); *Batts*, 844 F. 2d at 336-37; *Watson* v. *Fort Worth Bank & Trust*, 798 F. 2d 791, 798-99 (5th Cir. 1986), *vacated and remanded on other grounds*, — U.S. —, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (1988). In light of these factual determinations, the district court's ultimate conclusion that the plaintiff had not been subjected to racial or sexual discrimination was appropriate. *See, e.g., Batts*, 844 F. 2d at 337.

Finally, Sewell has alleged that the defendants failed to provide her with a pre-deprivation hearing before her termination, as mandated by the Supreme Court in *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L. Ed. 2d 494 (1985), *aff'g* 721 F. 2d 550 (6th Cir. 1983), and that the defendants had therefore deprived her of a property interest without due process of law in violation of § 1983. It is undisputed, however, that although Sewell was not provided with a pre-deprivation hearing before her September 3, 1981 demotion, she was retroactively reinstated, with full back pay and benefits, on September 25, 1981, and was accordingly not deprived of any property interest without due process of law as a result from her demotion of September 3, 1981. *Compare Carter* v. *Western Reserve Psychiatric Rehabilitation*, 767 F. 2d 270, 272

n.1 (6th Cir. 1985) (two day suspension was considered "*de minimis* and not deserving of due process consideration.") *with Boals* v. *Gray*, 775 F. 2d 686, 689 n.5 (6th Cir. 1985) (five day suspension not *de minimis*) *id.* at 697 (Wellford, Jr., concurring) (initial three day suspension was "*de minimis* property deprivation not deserving of due process consideration;" cumulative suspension of five days duration not *de minimis*); *accord Garraghty* v. *Jordan*, 830 F. 2d 1295, 1299 (4th Cir. 1987) (suspension not a *de minimis* deprivation where plaintiff "lost compensation and other emoluments of the office for the period of the suspension."). Furthermore, the plaintiff is barred from recovering under § 1983 for deprivation of property without due process by her failure to have demonstrated that the remedies provided to her under state law, namely, an appeal of the Merit Board's actions to the Jefferson County Circuit Court or the Jefferson County Fiscal Court, were inadequate to rectify any error committed by the Merit Board. *See Parratt* v. *Taylor*, 451 U.S. 527, 537, 101 S. Ct. 1908, 1914, 68 L. Ed. 2d 420 (1981); *Wilson* v. *Beebe*, 770 F. 2d 578, 583 (6th Cir. 1985) (en banc); *Vicory* v. *Walton*, 721 F. 2d 1062, 1065-66 (6th Cir. 1983), *cert. denied*, 469 U.S. 834, 105 S. Ct. 125, 83 L. Ed. 2d 67 (1984).

In regard to Sewell's February 24, 1982 demotion, Sewell herself testified during the trial that she had a meeting with Major Montgomery on February 22, 1982, during which they had discussed her forthcoming demotion. The district court credited Major Montgomery's testimony that, during their February 22, 1982 meeting, he had explained to Sewell the reasons for her demotion, and had provided her with an opportunity to respond to his statements. This encounter satisfied the requirements of a pre-deprivation hearing mandated by *Loudermill* in that Sewell was provided with "oral . . . notice of the charges against [her], an explanation of the employer's evidence, and an oppor-

tunity to present [her] side of the story." *Loudermill*, 470 U.S. at 546, 105 S. Ct. at 1495; *see also Duchesne* v. *Williams*, 849 F. 2d 1004, 1007 (6th Cir. 1988) (en banc); *Garraghty*, 830 F. 2d at 1300; *Schaper* v. *City of Huntsville*, 813 F. 2d 709, 714 (5th Cir. 1987). Plaintiff's suggestion that she was not properly accorded her pre-deprivation due process rights is in error.

This court has considered the plaintiff's remaining assignments of error and has concluded that they are without merit. Accordingly, the decision of the district court is AFFIRMED.

KENNEDY, Circuit Judge, concurring in part and dissenting in part.

I disagree with the majority's holding that Sewell waived her right to a jury trial. In all other respects, I concur in the court's opinion.

Plaintiff, who had made a jury demand, was entitled to a jury trial on her section 1981 and 1983 claims. *Amburgey* v. *Cassady*, 507 F. 2d 728, 730 (6th Cir. 1974). Since these are actions for constitutional torts, and thus "suits at common law," the Seventh Amendment guarantee of trial by jury applies. *Id.*; *see Curtis* v. *Loether*, 415 U.S. 189 (1974); *Pernell* v. *Southall Realty*, 416 U.S. 363, 370 (1974). ("This Court has long assumed that actions . . . for damages to a person or property, are actions to a jury.") The waiver of this right must be clear and unmistakeable. The failure of plaintiff's counsel to notice that the pretrial order stated that the case would be tried before the court does not, in my opinion, constitute the waiver of a constitutional right.

This is not a case in which plaintiff orally agreed to a jury waiver which was then memorialized in the court order as happened in *Fields Engineering & Equipment, Inc.* v. *Cargill, Inc.*, 651 F. 2d 589 (8th Cir. 1981). The colloquy at the beginning of the afternoon session of January 22

indicates that the designation of the trial as one before the court was inadvertent:

> THE COURT: The pretrial says, Mr. - final pretrial on September 15, 1986 says that this case is continued to January 22, 1987 for a trial before the Court.
>
> MR. CURTIS: [plaintiff's attorney]: But, Judge, I've asked for a jury trial in my complaint.
>
> THE COURT: I know you did; but somehow, at the pretrial—it came out as a non-jury trial; and your duty, when you got the pretrial order, if it was wrong was to object at that time.

The District Court found a waiver in counsel's failure to note this provision in the pretrial order and object to it before trial.

Amburgey provides an apt comparison. There, counsel, in response to the judge's suggestion that a jury trial would result in delay, admitted he had only requested a jury trial to "protect myself," that he was "not jumping up and down to try it before a jury" and "I would like to get my case tried and I know it's a lot quicker to try before the court." A panel of this Court held that these statements, "coupled with counsel's commencement of the trial without objection before the court, constituted a waiver of the earlier demand for a trial by jury," 507 F. 2d at 730.

Nor is this a case in which plaintiff acquiesced after learning that the case was to be tried without a jury as did the plaintiff in *Fiedler* v. *Marumsco Christian School*, 631 F. 2d 1144, 1149 (4th Cir. 1980); and *Southland Reship, Inc.* v. *Flegel*, 534 F. 2d 639, 644 (5th Cir. 1976), or raised the issue for the first time on appeal as did the plaintiff in *Lovelace* v. *Dall*, 820 F. 2d 223 (7th Cir. 1987). In the remaining case relied on by the majority, *Harden* v. *Adams*, 760 F. 2d 1158 (11th Cir.), *cert. denied sub nom. Grimmer*

v. *Harden*, 474 U.S. 1007, 106 S. Ct. 530, 88 L. Ed. 2d 462 (1985) there was, as the majority notes, a waiver in the amended complaint.

In *K.M.C. Co.* v. *Irving Trust Co.*, 757 F. 2d 752 (6th Cir. 1985), we applied a knowing and voluntary standard to contractual waivers of jury trial. The Court in *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), also a contractual waiver of jury trial case, stated ". . . a waiver of constitutional rights in any context must, at the very *least*, be clear." That there was a waiver here is anything but clear. It certainly was not knowing and voluntary. I would REMAND the action for a jury trial on the sections 1981 and 1983 claims.

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action C 83-0281-L(A)

LINDA SEWELL, - - - - - - - - - *Plaintiff,*

v.

JEFFERSON COUNTY FISCAL COURT, et al., - *Defendants.*

JUDGMENT — Entered February 4, 1987

This matter having been submitted for decision after four days of trial, and the Court having entered its findings of fact, conclusions of law and memorandum opinion, and being fully advised,

IT IS ORDERED AND ADJUDGED that judgment be and it is hereby entered in favor of defendants.

This is a final and appealable judgment and there is no just cause for delay.

Dated _____

_____

Charles M. Allen, Senior Judge

cc: Counsel of Record

IN THE

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FOR THE WESTERN DISTRICT OF KENTUCKY
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Civil Action C 83-0281-L(A)

LINDA SEWELL, - - - - - - - - - *Plaintiff,*

v.

JEFFERSON COUNTY FISCAL COURT, et al., - *Defendants.*

FINDINGS OF FACT, CONCLUSIONS OF LAW AND MEMORANDUM OPINION — Entered February 4, 1987

This action is submitted to the Court for a decision following four days of trial. The action was brought by the plaintiff, Linda Sewell, a white female, against the defendants, Jefferson Fiscal Court, Mitchell McConnell, Carl Brown, Jim Malone, Sylvia Watson, Jefferson County Corrections Department, Richard Frey, Jr., and Jeannette Priebe.

The Jefferson Fiscal Court is an administrative and legislative governmental agency of Jefferson County, Kentucky, and was at all times pertinent, the employer of the plaintiff. Defendants, Mitch McConnell, Carl Brown, Jim Malone and Sylvia Watson were each elected commissioners of the Fiscal Court at all times when the matters pertaining to plaintiff's law suit occurred. The Jefferson County Corrections Department has been previously dismissed since it is a nonsuable entity and is a department of the

Jefferson Fiscal Court. Richard Frey is the chief administrative officer and secretary of corrections.

Jeannette Priebe was the director of the Jefferson County Personnel at all times pertinent to the litigation. She was dismissed pursuant to a directed verdict granted by this Court at the trial for the reason that there was no evidence showing that she discriminated against the plaintiff or denied plaintiff due process or in any way infringed any rights of the plaintiff.

On January 4, 1980 plaintiff was appointed an acting sergeant. On July 18, 1980 she became a probationary sergeant and her period of probation expired on January 18, 1981. On September 3, 1981 plaintiff was demoted from what defendant Frey erroneously described as her current probationary status. On that same day plaintiff filed with the EEOC a charge alleging racial and sexual discrimination charge No. 0168982. Her EEOC charge was received by the Department of Corrections at some date after her demotion, although plaintiff attempted to prove that the EEOC charge was hand delivered to the Department of Corrections on the same day that she was demoted. Be that as it may, she filed an EEOC charge on September 14, 1981 alleging unlawful retaliation and unlawful demotion in her employment. On September 25, 1981 defendant Frey wrote plaintiff and admitted that she was already off probation and that the case involving her demotion was erroneously submitted on a probationary basis rather than a disciplinary basis and therefore, the department did not have a strong case which would result in disciplinary demotion. Frey therefore retroactively reinstated plaintiff on that date with full back pay.

On February 24, 1982 Major Montgomery, a white male, who was plaintiff's supervisor, wrote a lengthy three page letter to secretary Frey recommending the demotion of plaintiff from the rank of sergeant to the rank of officer.

That memorandum followed a meeting at which Major Montgomery, Virginia Lindsey, an employee of the Department of Corrections who was not in security, and plaintiff participated. Plaintiff claims that she was told only that she was demoted but was not given the reasons why. Major Montgomery testified to the contrary and the court accepts his testimony.

Following the receipt of the Montgomery memoranda, secretary Frey advised the plaintiff that she had been demoted and that she had the right of appeal to the Corrections Merit Board. Plaintiff thereupon hired an attorney, Richard Caslin, and appealed her demotion to the Merit Board, which unanimously rejected her appeal. She thereupon filed suit in this Court, although she had a right of appeal to the Jefferson Circuit Court or to the Jefferson Fiscal Court.

On April 23, 1982 plaintiff resigned her employment with the Department of Corrections. On May 17, 1982, she filed a charge of constructive discharge and retaliation against her employers.

Plaintiff has alleged causes of action under 42 U. S. C. §§ 1981, 1983 and Chapter VII of the Civil Rights Act of 1964, as amended, to-wit, 42 U.S.C. § 2000e and 2000e(3) (retaliation statute). We will discuss first the problems raised by her claims under 42 U.S.C. § 1983 wherein she alleges that she was denied equal protection of the laws and due process. Her primary contention is that under the rules and regulations of the Department of Corrections, an employee who is facing disciplinary charges is entitled to appear before a disciplinary board which is composed of the employee, her floor captain/supervisor and her manager/department manager. Under that provision of the Jefferson County Corrections Department policies and procedures dated April 15, 1981, if the employee does desire an administrative hearing, the employee floor captain/

department manager who initiated the disciplinary proceeding will recuse himself, and another captain/department manager will sit on the board at the hearing.

The employee is entitled to request witnesses other than inmates, inmates being restricted to written testimony. After the administrative disciplinary board has met and made its decision, its actions are appealable to the Director of Safety, Mr. Frey, whose decision is designated as final subject, however, to the right to appeal to the County Merit Board within ten days for discipline involving suspension over ten days or termination.

The policies and procedures document contains some twenty-two categories for which an employee may be disciplined, one of which is improper supervision. Under penalties, the documents state "Demotion—this is a penalty that may be used as punishment for a violation incurred by a supervisor in areas related to supervision and leadership.

In a badly worded final paragraph, the document states that penalties will not be assessed against an employee on a progressive basis if violations occur at six month intervals. This would serve to prevent the department from imposing disciplinary penalties for disciplinary violations that are more than six months old or for using these penalties to bolster the most recent disciplinary charge.

Plaintiff presented evidence that in the majority of cases an employee who is facing disciplinary action by the corrections department uses the administrative procedures set out in the policies and regulations and does not appeal directly to the Merit Board. The defendant responds by citing the instance of one individual who filed an appeal directly with the Merit Board. The defendants also contend that the action of demotion taken against the plaintiff was not a disciplinary action but was an act that could be accomplished by a letter from the Secretary, Mr. Frey, to

the plaintiff and by the plaintiff's right of appeal to the Merit Board.

It is interesting to note that the plaintiff herself in an affidavit filed in support of her motion for summary judgment states that when she received the first demotion in September 1981, she timely filed an appeal to the Merit Board. This would seem at least to indicate that at that time she believed that her due process rights were better protected by an appeal to the Merit Board than by going through the administrative procedures.

In Mr. Frey's letter dated February 25, 1982 addressed to plaintiff, he entitled the subject matter as being plaintiff's "disciplinary action." He stated in the letter that after reviewing Major Montgomery's report and plaintiff's performance on February 15, 1982 and her personnel record over the last two years, he had no other choice but to demote the plaintiff. He stated in the memorandum that plaintiff had the right to appeal the decision to the Jefferson County Corrections Department Merit Board in writing within ten days.

The Court is not at all convinced by the defendants' attempted distinction between a disciplinary action and an action involving alleged poor judgment on the part of a supervisor such as plaintiff. It would seem that Secretary Frey thwarted the plaintiff of any right to an administrative hearing by his speedy action in demoting her and at the same time stating that an action was appealable to the Merit Board. Even if the Department has violated its own rules, the question presented under 42 U.S.C. § 1983 is whether or not the defendants violated the constitutional rights of the plaintiff to substantive due process.

The plaintiff relies upon the decision in *Cleveland Board of Education* v. *Loudermill*, —— U.S. ——, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985). That case holds that an employee of a public agency should not be deprived of his

right to employment without prior notice and without an opportunity to be heard. *See Loudermill, supra,* at 1493. The specific dictates of due process are determined by balancing the competing interests at stake in the particular case. *See Matthews* v. *Eldridge,* 424 U.S. 319, 335 (1976). In public employment cases such as this, these interests are (1) plaintiff's private interest in retaining his position of employment; (2) defendant's government interest in expeditious removal or demotion of unsatisfactory employees and in avoidance of administrative burdens; and (3) risk of erroneous deprivation. *See Loudermill, supra,* at 1493; *Matthews, supra,* at 335.

Loudermill was concerned with the due process rights of two Ohio public employees prior to their termination by the defendant school boards. Under Ohio law, the employees could be terminated only for cause and were entitled to full post termination evidentiary hearings and judicial review. The Supreme Court held that the predeprivation process must simply provide an initial check against mistaken decisions, essentially a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action. Where a prompt post deprivation evidentiary hearing is available, due process requires only that the employee be afforded notice of the charges, an explanation of the employer's evidence and an opportunity to present his side of the story prior to the deprivation. A predeprivation evidentiary hearing is not constitutionally mandated. *See Loudermill, supra,* at 1494.

The case of *Williams* v. *City of Seattle,* 607 F. Supp. 714 (D. C. Wash. 1985) properly points out that a demotion is a less compelling deprivation than that experienced by the terminated employee in *Loudermill.* The court held that a demoted police officer was not entitled to an evidentiary hearing prior to his demotion, although the Court did

indicate that plaintiff's rights might be considered the equivalent of the plaintiff's in the *Loudermill* case. The court did point out that the governmental interest in the case was stronger in *Williams* than it was in *Loudermill*. Finally, the *Williams* court pointed out that the unsubstantial risk of erroneous action by the chief of police weighed against plaintiff's claim of a constitutional entitlement to a pre-demotion evidentiary hearing.

We hold that even if it is assumed arguendo that the defendants violated the rights of the plaintiff to an administrative hearing prior to her demotion that the conference held between her and Major Montgomery and Mrs. Lindsey gave the plaintiff oral notice of the fact that she was to be demoted and that the reasons for her demotion were explained to her and that she had an opportunity to present her side of the story, which she did. This is all that is required by the decision in *Loudermill* and by the due process clause, particularly in light of the fact that plaintiff received a very prompt hearing on her appeal to the Merit Board. We therefore hold that there was no due process violation.

With regard to plaintiff's equal protection rights, we conclude that they were not violated. She introduced evidence which indicated that persons who were disciplined by the Corrections Department were given a form indicating the proposed action to be taken, an opportunity to fill the form out in writing, and an opportunity to present their objections to the proposed action before the administrative board, discussed previously. She did not present any evidence that white females were discriminated against in this regard other than the evidence that she was not given a notice of disciplinary action and a form which she could have filled out in writing, as well as initiating an appeal to the administrative board. The administrative process seems to have been followed both as to blacks and to whites, males and females. Defendant introduced evidence that

approximately 20% of the ten or twelve employees who were demoted over a period of six years were demoted by the use of a memorandum from the secretary to the officer followed by an appeal to the merit board. We hold that plaintiff's equal protection rights were not violated.

With regard to plaintiff's discrimination claims and retaliation claims under Title VII, it is apparent that plaintiff's demotion arose out of an incident which occurred on February 15, 1982 and the details of which are set out in a memorandum of three pages from Major Montgomery, the plaintiff's supervisor, to defendant Frey. In the memorandum, Major Montgomery recounts that the plaintiff was located at the jail on February 15, 1982 and was given the responsibility of handling the beat at the jail, as well as the responsibility for matters which occurred at the Community Treatment Center and at the hospital. At the time the plaintiff assumed her responsibilities at the jail, the captain in charge had assigned to her supervision Officer Cherlyn Hall and two trainees to supervise the third floor of the Community Treatment Center, a newly opened facility which was in its second day of operation. Officer Hall was armed and the two trainees were not. The two trainees were Emma and Donna Bell. At the hospital guarding a patient was Officer Josephine Rodes. She was armed. Officer Rodes called Sergeant Sewell from the hospital and stated she needed a break. Sergeant Sewell responded by sending Officer Hall to the hospital, leaving the Community Treatment Center third floor under the supervision of the two unarmed trainees. Officer Hall was gone for some forty minutes and during that time an argument broke out between two of the female inmates. The female inmates were not under lock and key at that time and the trainees were unable to place them in their cells until Officer Hall returned and did so.

The memorandum of Major Montgomery also mentioned a report from Captain Gracie Smith, a black female, to the effect that Donna Bell had told her that plaintiff has spoken in a derrogatory fashion about the Department and about Captain Smith. Since these comments about Captain Smith were not the basis for Secretary Frey's decision to demote plaintiff, we shall not spend any time in discussing that aspect of the Montgomery memorandum.

Major Montgomery, Secretary Frey and the Merit Board all concluded that the plaintiff showed a serious lack of judgment in allowing the third floor of the CTC to be supervised by the trainees with two years experience and in dispatching Officer Hall to the hospital to relieve Officer Rodes. The Merit Board even indicated that possibly more serious action than demotion should have been taken against the plaintiff.

In the case of *Jackson* v. *RKO Bottlers of Toledo, Inc.*, 743 F. 2d 370 (6th Cir. 1984), the court pointed out that in a discrimination case, "plaintiff must establish facts, by a preponderance of the evidence, which if not explained, prove or give rise to an inference of unlawful discrimination. If the plaintiff successfully establishes a prima facie case, the burden is then on the defendant to articulate a legitimate, nondiscriminatory reason or reasons for its actions." *Citing cases.* "If defendant comes forward with such a reason, plaintiff may then attempt to establish that the nondiscriminatory reason articulated by the defendant was a mere pretext for the alleged discriminatory action. *Citing Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 256 (1981). "However, the plaintiff at all times carries the ultimate burden of proving racial discrimination, even though the burden of going forward with the evidence may shift between the plaintiff and the defendant." *Citing Haynes* v. *Miller*, 669 F. 2d 1125, 1126-27 (6th Cir. 1982).

The courts have recognized that as the nature of claims of discrimination differ, so must the standards for establishing a prima facie case. 42 U.S.C. Sec. 2000e was motivated by Congressional recognition of an entrenched history of employment discrimination against minorities. *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567 (1978). A plaintiff who is a member of one of the protected classes and claims to have suffered discrimination because of membership in that class relies on that Congressional recognition, and may establish facts that "give rise to an inference of unlawful discrimination" by showing membership in the protected class, qualification for the withheld benefit, and adverse action. *McDonnell-Douglas* v. *Green*, 411 U.S. 792 (1973). This is the test of adequacy that must apply to plaintiff's prima facie case of sex discrimination.

Insofar as the charge of gender discrimination under 42 U.S.C. 2000e-(2)(a) is concerned, the Court is of the opinion that plaintiff's evidence of a prima facie case was rather weak. She did introduce evidence concerning a sexist remark allegedly made by Secretary Frey at a meeting he had with four female sergeants. She also introduced evidence to the effect that she was not allowed to work on the fifth floor and to supervise male inmates who were on that floor, whereas male officers were allowed to supervise female inmates.

As stated in *Jackson*, the question to be decided by the Court is whether the reasons given by the defendants for the demotion were in fact the real reasons. We conclude that plaintiff offered no substantial evidence to show that the reasons given for her demotion were not the real reasons and we find for the defendants under 42 U.S.C. 2000e-(2)(a).

We shall assume for purposes of this opinion that this evidence was sufficient to establish plaintiff's prima facie case, but even if it was, defendant articulated nondiscrimi-

natory reasons for their actions. With regard to the refusal to assign her to duty on the fifth floor to guard males, it was shown that the male bath rooms and shower facilities were within plain view of a supervisor and that their privacy would have been invaded had a female been assigned to supervise that walk. This circumstance did not exist in the female section. With respect to the reasons for the demotion of February 19, 1982, plaintiff's primary contention was that any officer assigned to guard a hospital patient had to be armed and that because of that policy, she sent Officer Hall to the hospital.

Discrimination on the basis of one of the prohibited characteristics is no less objectionable when it works to the detriment of the majority group rather than the minority group. However, since such "reverse" discrimination is historically much less likely to occur, such a plaintiff must establish the context that "gives rise to an inference of unlawful discrimination." Thus, while the ultimate standard for testing the adequacy of the case is the same for a minority or majority, the formulation of the prima facie case is different in a case of "reverse" discrimination.

With regard to plaintiff's claims of reverse discrimination, the plaintiff has not met her burden of demonstrating that she was intentionally discriminated against despite her majority statuts. *See Murray* v. *Thistledown Racing Club, Inc.*, 770 F. 2d 63 (6th Cir. 1985). A prima facie case of reverse discrimination is established upon a showing that "background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority." *Citing Parker* v. *Baltimore and Ohio Railroad*, 652 F. 2d 1012, 1017 (D.C. Cir. 1981) and *Daye* v. *Harris*, 655 F. 2d 258 (D.C. Cir. 1981), and upon a showing that the employer treated differently employees who were similarly situated but not members of the protected group. *See also Bundy* v. *Jackson*, 641 F. 2d 934,

951 (D.C. Cir. 1981). In the instant case, there was no showing that the majority of officers at the Corrections Department were black. The evidence reflected in fact that plaintiff's supervisors were white and there was no showing that practices grounded in an affirmative action program were at issue.

With reference to disparate treatment of whites as against blacks, there was no probative evidence to that effect. Plaintiff claimed she was not given a promotion to captain, and that Gracie Smith, a black female, was. While we do not believe that any evidence was offered to make a prima facie case as to this event, we note that the only evidence concerning this promotion was that Ms. Smith had been with the Department longer than plaintiff and had served as a sergeant longer than had plaintiff. The only substantial evidence which plaintiff introduced to show any disparate treatment was in the area of the remedies afforded to her to contest her demotion, a matter that we have previously discussed. Even if the evidence produced by the plaintiff was sufficient to create a prima facie case of reverse discrimination, which we strongly question, the evidence is clear to the effect that plaintiff's demotion was based upon legitimate nondiscriminatory reasons which were the real reasons.

Finally, with reference to plaintiff's claim under 42 U.S.C. 1981, the duty is on plaintiff to demonstrate that the defendants intentionally discriminated against her on the basis of race. *See Murray, supra,* and cases cited therein.

The Court is of the opinion that plaintiff did not carry her burden of proving by a preponderance of the evidence that the defendants were guilty of intentional racial discrimination and therefore her claim under 42 U.S.C. § 1981 must be dismissed.

With respect to the retaliation claims of the plaintiff, *Jackson, supra,* lays down the following rules. Plaintiff

must establish "(1) that he engaged in activity protected by Title VII; (2) that he was the subject of adverse employment action; and (3) that there exists a casual link between his protected activity and the adverse action of his employer." [Citations omitted]

It will be recalled that plaintiff's first retaliation claim was filed on September 14, 1981 and alleged that plaintiff had been discriminated against in the matter of her demotion because of her sex. Eleven days after that charge was filed, defendants took action to correct the decision to demote her. The reason for taking that step was nondiscriminatory i.e., that Secretary Frey had erroneously concluded that plaintiff was on probationary status, whereas she was in fact on permanent status; and therefore, the action which could have been taken against her had she been on probationary status should not have been taken against her in her permanent status since the evidence did not justify a disciplinary demotion.

While plaintiff amended her retaliation charges in November 1981, that charge related to a verbal reprimand which she received from Secretary Frey as well as a memorandum written her concerning her request for a certificate and hat pin. Neither of these matters appears to be of great significance and neither appears to be related to the original discrimination and retaliation charges.

The last retaliation charge filed by the plaintiff was filed after her demotion. Again, the plaintiff has not established that there was a casual link between her protected activity and the adverse action of the defendants in demoting her. As stated before, the reason for the demotion was the poor judgment shown by plaintiff on February 15, 1982. In this connection, we note that the direct evidence introduced by the plaintiff as to retaliation is not nearly as strong as was the direct evidence produced by the plaintiff in *Jackson, supra*, which the court of appeals held sufficient to estab-

lish a prima facie case. In that case, plaintiff produced evidence that following the filing of charges, he was removed from his office, excluded from production meetings, and that defendant's general manager improperly attempted to persuade two female employees to file sexual harassment charges against the plaintiff. Plaintiff also introduced evidence raising an inference that the incident triggering discharge was not carefully investigated and that defendants on other occasions had treated similar instances more leniently with other employees.

Since the *Jackson* court and other courts have held that the "plaintiff's burden with respect to establishing a prima facie case is not onerous," we assume for the purpose of this opinion that plaintiff did establish a prima facie case but hold for reasons previously given that defendants' profferred legitimate reason for demotion was not pretextual and was the real reason.

Finally, given plaintiff's termination of her employment on April 23, 1982, we must address her claim of constructive discharge. In *Held* v. *Gulf Oil Co.*, 684 F. 2d 427 (6th Cir. 1982), the Sixth Circuit adopted the Fifth Circuit's test of constructive discharge, which requires a determination that "working conditions would have been so difficult or unpleasant a reasonable person in the employee's shows would have felt compelled to resign." *Bourque* v. *Powell Electric Mfg.*, 617 F. 2d 61, 65 (5th Cir. 1980). To meet this test, plaintiff must demonstrate more than dissatisfaction, more than embarassment concerning discipline, more than subjective preference for one position over another. See, e.g., *Kelleher* v. *Flawn*, 761 F. 2d 1079 (5th Cir. 1985), *Shawgo* v. *Spradlin*, 701 F. 2d 470 (5th Cir.), (cert. denied 464 U.S. 965 (1983). After analyzing the evidence presented, we are unable to identify any circumstances suggestive of working conditions so intolerable that a reason-

able person would be forced to resign, and we must reject plaintiff's contention that she was constructively discharged.

A judgment will be entered this day on behalf of the defendants.

Dated February 4, 1987.

(s) Charles M. Allen
Charles M. Allen, Senior Judge

cc: Counsel of Record

§ 2000e-2. Unlawful employment practices

Employer practices

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

§ 20000e-3. Other unlawful employment practices

Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.